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Nos. 91-261 and 91-274

In the

Supreme Court of the United States

OCTOBER TERM, 1992

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, PETITIONER

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC., PETITIONERS

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE MASTER PRINTERS OF AMERICA AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

The National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, provides for comprehensive regulation of the relationships between employees, employers and unions in the private sector. Sections 8(e) and 8(f) of the NLRA, 29 U.S.C. § 158(e) and (f), contain narrow exceptions to the general rules prohibiting an employer from agreeing to restrict its subcontracting to union signatory employers or from entering into a collective bargaining agreement with a union that does not represent a majority of its employees. These exceptions are expressly limited to employers "in the construction industry" and to employers "engaged primarily in the building and construction industry," respectively, and to agreements meeting very specific qualifications. The question presented is:

Whether a state agency, which is not otherwise subject to the regulatory mantle of the NLRA and which does not directly employ any construction employees, may nevertheless claim the privilege of entering into collective bargaining agreements under Sections 8(f) and (e) of the NLRA, or otherwise adopt policies which interfere with the federally regulated labor relations practices of those with whom it contracts.

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BRIEF OF THE MASTER PRINTERS OF AMERICA AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE MASTER PRINTERS OF AMERICA

The Master Printers of America ("MPA") is a division of Printing Industries of America, an international, not-for-profit trade association, representing commercial printing establishments in the graphic arts industry throughout the U.S. and Canada. MPA itself represents approximately 8,500 members, whose employees are either wholly or partially union-free.

MPA is dedicated to serving these members through the development of positive employee relations programs, and making these programs available to its members.

If the Court were to adopt Petitioners' argument in this case, states would be allowed to restrict their contracting practices based upon the labor relations policies of the parties with whom they contract. MPA's interest in this litigation is to insure that its members are not arbitrarily and improperly excluded from the right to bid and perform state financed projects solely because of their status as non-union employers.

STATEMENT OF THE CASE

The Massachusetts Water Resource Authority ("MWRA") is an agency of the Commonwealth of Massachusetts. It is responsible for providing water supply services and sewage collection treatment and disposal services for the eastern half of Massachusetts. As part of its obligation to supply these services the MWRA is responsible for overseeing and implementing the court ordered clean-up of the Boston Harbor ("Boston Harbor Project"). *See, generally, United State v. Metropolitan District Commission*, 757 F. Supp 121 (D.Mass.), *aff'd*, 930 F.2d 132 (1st Cir. 1991). The actions of the MWRA in fulfilling its duties are governed by various state laws requiring, *inter alia*, that the MWRA provide the funds for construction, own the property to be built, establish all bid conditions, decide all contract awards, pay the contractors, and generally exercise controls over all aspects of the project. See, generally, Mass. Gen. Laws, Ch. 92, § 1-1, *et seq.*, and the Commonwealth's public bidding laws, Mass. Gen. Laws, Ch. 149, §§ 45 A-45L and Ch. 30, § 39M.

In April 1988, the MWRA selected Kaiser Engineers Inc. ("Kaiser") as its construction manager for the Boston Harbor Project. In this capacity, Kaiser is responsible for overseeing, on behalf of the MWRA, the construction of the new treatment

facilities and the upgrading of existing facilities needed for the court ordered clean-up.

Initially, work on the project began using both union and non-union contractors. However, on May 22, 1989, Kaiser, acting as MWRA's agent, entered into the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement ("Project Agreement") with the Building and Construction Trades Council of the Metropolitan District and various affiliated unions ("Trades Council" or "Petitioners"). This Project Agreement recognizes the Trades Council as the representative of all construction employees on the project and establishes the terms and conditions of employment for the life of the 10 year project. The agreement covers all contractors and subcontractors on the project, and it contains a union security clause and provisions for union hiring halls. It is undisputed that this Project Agreement was entered into "on behalf of" the MWRA and that all of the terms of the Project Agreement were approved by the MWRA prior to its execution. It is also undisputed that the agreement contains requirements which are unlawful under the NLRA unless they satisfy the exceptions set forth in Sections 8(f) and (e) of the National Labor Relations Act. 29 U.S.C. § 158(f) and (e).

In order to implement the Project Agreement, the MWRA adopted Specification 13.1 which requires any successful bidder for project work, as a condition of being awarded the work, to execute and abide by the terms of the Project Agreement between the MWRA and the Trades Council. This specification effectively precludes any contractor from being awarded any work on the Boston Harbor Project, whether union or non-union, unless it agrees to waive its rights under the NLRA to determine its own labor relations policies.

In March 1990, the Associated Builders and Contractors of Massachusetts/Rhode Island and six of its affiliates ("Respondents"), brought this action in the United States District Court

for the District of Massachusetts challenging both Specification 13.1 and the Project Agreement. On April 11, 1990, the District Court denied Respondents' request for a preliminary injunction and an appeal followed. On October 24, 1990, a unanimous panel of the Court of Appeals for the First Circuit reversed the District Court and issued a preliminary injunction against enforcement of the Project Agreement by the MWRA through any bid specifications which require private contractors to waive their statutory bargaining rights as a condition for working on the Boston Harbor project. The Court of Appeals granted rehearing *en banc* and, on May 15, 1991, a 3-2 majority of the Court of Appeals reaffirmed the panel decision. *Associated Builders and Contractors of Massachusetts/Rhode Island, Inc., et al. v. The Massachusetts Waste Resources Authority, et al.*, 935 F.2d 345 (1st Cir. 1991).

Both the panel opinion and the majority below found that the state agency's enforcement of the "union only" project agreement was pre-empted by the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* Although the court found that the actions of the MWRA implicated pre-emption principles under both *Garmon*[1] and *Machinists*,[2] the majority of its analysis focused on the latter principles. Relying upon this Court's teaching in the *Golden State Transit Corp. cases*,[3] the Court found that the MWRA had improperly interfered with the collective bargaining process by imposing the Project Agreement upon any contractor seeking to work on the Boston Harbor clean-up. The Building and Construction Trades Council and the MWRA filed petitions for certiorari on August 12 and 13, 1991. On May 18,

1 *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

2 *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976).

3 *Golden State Transportation Corporation v. City of Los Angeles*, 475 U.S. 608 (1986) [*Golden State I*] and *Golden State Transportation Corporation v. City of Los Angeles*, 493 U.S. 103 (1989) [*Golden State II*].

1992, this Court granted the petitions and consolidated the cases for argument.

When distilled to its essence, Petitioner's argument is that the Massachusetts Water Resource Authority, acting as a so-called "market participant," should be allowed the same latitude as private parties to enter into contracts or otherwise restrict its contracting practices in such a way to exclude potential contractors whose labor relations policies do not conform with government ordained criteria. Because private sector employers under certain circumstances are allowed to restrict their contracting practices based upon the labor relations policies of the parties with whom they contract, the legal vindication of such a ruling could result in the total exclusion of non-union employers and their employees from bidding on and fulfilling contracts by the state or divisions thereof in those jurisdictions where the state or local government officials felt so inclined. Accordingly, the ruling sought by Petitioners would nullify prior Court precedent prohibiting state or local authorities from interfering in labor relations policies of private employers and their employees within their jurisdictions.

SUMMARY OF ARGUMENT

I. "MARKET PARTICIPANT" DOCTRINE IS INAPPLICABLE UNDER THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. § 151, *ET SEQ*.

In *Wisconsin Department of Industry, Labor and Human Relations et al. v. Gould Inc.*, 475 U.S. 282 (1986), the Court rejected the so-called "market participant" doctrine as a defense to pre-emption under the National Labor Relations Act (NLRA) 29 U.S.C. § 151 *et seq.* In urging the reversal of the *en banc* opinion of the court of appeals below, Petitioners urge a revisionist interpretation of *Gould* and a re-emergence of the "market participant" doctrine under the NLRA. In support of their argument, Petitioners quote out of context selected phrases

from the Court's decision in *Gould*. However, when viewed in its proper context, it is clear that the language in the Court's opinion was not preserving any aspect of the "market participant" doctrine under the NLRA. Rather, the Court merely was emphasizing that its rejection of the "market participant" doctrine should not be read as modifying the existing principles for pre-emption.

II. TRADITIONAL PRE-EMPTION ANALYSIS

The majority below correctly found that the MWRA's actions in this matter negotiating, executing, and implementing the project agreement at issue in this case implicates pre-emption under both *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) and *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976). *Garmon* pre-emption is implicated because the MWRA, through Specification 13.1 and the underlying Project Agreement which it enforces, sought to interfere with the fundamental rights of employees under the National Labor Relations Act to decide whether to "join, form, or assist a labor organization," as well as their right to participate in the collective bargaining process which has established the terms and conditions of their employment for the next ten years.

Machinists pre-emption is implicated because the MWRA has interfered with the rights of Respondents and other private sector contractors to determine in the first instance how to order their labor relations. The legislative history of Section 8(f) of the National Labor Relations Act clearly demonstrates that pre-hire agreements were intended to be entirely voluntary. Thus, although Congress intended to allow such agreements, employers were to be free from government or union coercion in determining whether, or under what conditions, to enter into such agreements. Clearly, such a voluntary decision on the part of private employers is a matter which Congress chose to protect

and leave free from state regulation. *Golden State Transit Corporation v. City of Los Angeles*, 475 U.S. 608 (1986).

III. EVEN ASSUMING THE "MARKET PARTICIPANT" DOCTRINE HAS SOME APPLICATION UNDER THE NLRA, PETITIONERS' "MARKET PARTICIPANT" ANALYSIS IS FATALLY FLAWED.

Even assuming, *arguendo*, that some aspect of the "market participant" doctrine survived *Gould*, the analysis of Petitioners is fatally flawed in several respects. First, the MWRA cannot be considered a "market participant" under any reasonable definition or interpretation of that concept. The "market" in which the MWRA seeks to be a "participant" is heavily regulated by the NLRA; however, unlike its private sector counterparts who comprise this market, the MWRA is not regulated by the NLRA at all. Moreover, the MWRA is not driven by the same market forces as private sector participants in this market. The MWRA is subject to political pressure and other influences which do not effect private sector employers. Lastly, in contrast to private sector employers, the MWRA is spending taxpayer-generated funds. Thus, as a matter of fundamental fairness, the MWRA should not be able to exclude certain contractors/employers and their employees from public works projects based solely upon labor relations choices lawfully made by these employees which are fully protected under the NLRA.

In addition, Petitioners' "market participant" argument is based upon the underlying premise that a private sector property owner would be allowed to enter into a contract such as that entered into by the MWRA. However, there is no legal precedent for this proposition. Indeed, there is no authority whatsoever that a private property owner who itself employs no construction employees may enter into and enforce an agreement under Sections 8(f) and (e) of the National Labor Relations Act. To the contrary, the NLRB General Counsel previously has authorized a complaint in a case where the employer did not

hire and did not intend to hire any construction employees. *See Building & Trades Council*, NLRB Case No. 1-CE-71 (NLRB-GC June 25, 1990), note 12 and accompanying text (reprinted as Appendix D at BCTC Pet. App. 83a-88a), citing *Plumbers Union Local 246 (Marlin Mechanical, Inc.)*, NLRB Case No. 32-CE-52 (NLRB-GC January 31, 1989) (original complaint reprinted as Appendix A hereto).

The final flaw in the "market participant" argument is that limiting the state to contracts allowed under the NLRA to private sector employers would in fact be subjecting states to NLRA regulation, a proposition which Congress specifically rejected. Petitioners would measure the lawfulness of state spending decisions by the criteria applicable to private sector employers, thus allowing states to enter into any contract allowed to a private sector employer and denying this right where it would be denied to private sector employers. Under such a rule, state agencies, such as the MWRA, would be *de facto* subject to the National Labor Relations Act. This would be directly contrary to the express intention of Congress in excluding such agencies from the definition of employer in Section 2(2) of the Act.

ARGUMENT

I. "MARKET PARTICIPANT" DOCTRINE IS INAPPLICABLE UNDER THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. § 151, *ET SEQ*.

A. The So-Called "Market Participant" Doctrine Does Not Constitute An Exemption To The Application Of Traditional Pre-Emption Principles Developed Under The NLRA.

In challenging the decision below, Petitioners make the superficially appealing, but erroneous argument that the Massachusetts Water Resource Authority, as a so-called "market participant," should be allowed to enter into any contract or otherwise adopt contracting practices which would be legally

permissible if adopted by private sector employers. However, this Court previously has rejected the "market participant" doctrine as a defense to pre-emption under the National Labor Relations Act. *Wisconsin Department of Industry, Labor and Human Relations, et al. v. Gould Inc.*, 475 U.S. 282 (1986). Petitioners urge a revisionist interpretation of *Gould* and a reemergence of the "market participant" doctrine as an exception to pre-emption under the NLRA.

In *Gould*, the Court was asked to adjudicate the validity of a Wisconsin statute debarring repeat violators of the National Labor Relations Act from doing business with the state. In holding that the Wisconsin statue was pre-empted by the NLRA, the Court specifically rejected Wisconsin's argument that its status as a "market participant" privileged its conduct. The Court stated

> [T]he 'market participant' doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted.
>
> * * * *
>
> What the Commerce Clause would permit States to do in the absence of the NLRA is thus an entirely different question from what States may do with the Act in place. Congressional purpose is the 'ultimate touchstone' of pre-emption analysis . . . and *we cannot believe that Congress intended to allow States to interfere with the 'interrelated federal scheme of law, remedy, and administration' . . . under the NLRA as long as they did so through exercises of the spending power.*

475 U.S. at 289-290 (citations omitted, emphasis added).

The Court specifically rejected the state's argument that the statute should be upheld since the conduct in question was not prohibited to private sector employers under the Act.

> Nothing in the NLRA, of course, prevents private purchasers from boycotting labor law violators. But *government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints*. Outside the area of Commerce Clause jurisprudence, it is far from unusual for federal law to prohibit States from making spending decisions in ways that are permissible for private parties.
>
> * * * *
>
> *The NLRA, moreover, has long been understood to protect a range of conduct against state but not private interference.*
>
> * * * *
>
> The Act treats state action differently from private action not merely because they frequently have different forms, but also because in our system *States simply are different from private parties and have a different role to play.*

475 U.S. at 290 (citations omitted, emphasis added).

In urging the Court to resurrect the "market participant" doctrine under the NLRA, Petitioners focus on the Court's caveat in *Gould* that "[w]e do not say that state purchasing decisions may never be influenced by labor considerations." However, the quote is taken out of context, omitting key language demonstrating that the Court did not intend its caveat to preserve the "market participant" doctrine as a defense to pre-emption under the NLRA. The full quote reads:

> We do not say that state purchasing decisions may never be influenced by labor considerations, *any more than the NLRA prevents state regulatory power from ever touching on matters of industrial relations.* Doubtless some state spending policies, like some exercises of the police power, address conduct that is

> of such 'peripheral concern' to he NLRA, or that implicates 'interests so deeply rooted in local feeling and responsibility,' that pre-emption should not be inferred. *Garmon*, 359 U.S., at 243-244; see also, e.g., *Belknap, Inc. v. Hale*, 463 U.S. 491, 498 (1983). And some spending determinations that bear on labor relations were intentionally left to the States by Congress. *See, New York Tel. Co. v. New York State Labor Dept.*, 440 U.S. 519 (1979). But Wisconsin's debarment rule clearly falls into none of these categories. We are not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or with a law that pursues a task Congress intended to leave to the States.

475 U.S. at 291 (emphasis added).

Taken in context, the Court's caveat, far from announcing any new exemption to basic pre-emption principles, merely affirms that its rejection of the "market participant" doctrine does not alter existing pre-emption rules which under certain circumstances allow state action of "peripheral concern" to the NLRA or which involves "deeply rooted" state interests. No such circumstances are involved in the instant case.[4]

[4] These generally recognized exceptions to the pre-emption doctrine simply do not apply in the instant case. The power of a state to interfere with the freedom of choice guaranteed employees under the NLRA goes to the very heart of the federally regulated scheme of labor relations. In the instant case the state's purchasing power is being used in such a way as to penalize employees for exercising their right to remain union-free by depriving them of the opportunity to work on state funded projects. Such an ability to thrust itself into the federally-protected decision making process of employees subject to the NLRA clearly constitutes an action which is more than a peripheral concern of the federal statute and, indeed, strikes at the very core of the NLRA's free choice guarantees. Nor does the purchasing power of the state, as evidenced in the instant case, involve such "deeply rooted" state interests as to fall within the pre-emption exceptions.

In summary, in *Wisconsin Department of Industry v. Gould, supra*, the Court clearly drew a parallel under the NLRA between a state's regulatory power and its spending power. In either case, the Court held that the traditional pre-emption analysis is to be applied. Contrary to Petitioner's argument, the "market participant" doctrine does not provide a mechanism for escaping this traditional pre-emption analysis. Thus, the action of the MWRA in negotiating, executing & implementing the instant project agreement which seeks to control the labor relations policies of bidders and potential bidders remains subject to a traditional pre-emption analysis under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) and *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), and their progeny.

II. TRADITIONAL PRE-EMPTION ANALYSIS

Applying the analysis which this Court has employed in previous pre-emption cases, it is clear that the instant case meets standards which have been laid down for the application of the pre-emption doctrine and does not fall into any of the doctrine's recognized exceptions.

Pre-emption under the National Labor Relations Act has evolved under two distinct lines of cases. The first, known as Garmon pre-emption, see *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), prohibits states from regulating "activity that the NLRA protects, prohibits or arguably protects or prohibits." *Wisconsin Department of Industry v. Gould Inc.*, 475 U.S. 282 (1986). Garmon pre-emption is intended to preclude state interference with the Labor Board's interpretation and active enforcement of the "integrated scheme of regulation" established by the NLRA. *Golden State Transportation Corporation v. City of Los Angeles*, 475 U.S. 608 (1986). A second line of reasoning, known as Machinists pre-emption, see *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), precludes state and municipal regulation

"concerning conduct that Congress intended to be unregulated." *Metropolitan Life Insurance Company v. Massachusetts*, 471 U.S. 724 (1985).

The majority below correctly found that the action of the Massachusetts Water Resource Authority in negotiating, executing and implementing the project agreement at issue in this case implicates both forms of pre-emption.

A. Pre-emption Under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

A Garmon analysis begins with a determination as to whether or not the state action in question impacts upon an activity "that the NLRA protects, prohibits, or arguably protects or prohibits." See *Gould, supra*. If the conduct with which the state has sought to interfere is actually protected by federal law, "pre-emption follows not as a matter of protecting primary jurisdiction, but as a matter of substantive right." *Brown v. Hotel Employees Union Local 54*, 468 U.S. 491 (1984). If the conduct is only arguably protected by federal law, a balancing test is utilized to determine whether the conduct is of such "peripheral concern" to the NLRA or whether it involves "interests so deeply rooted in local feeling and responsibility" that pre-emption should not be inferred. *Garmon*, 359 U.S. at 243-244; see also *e.g.*, *Belknap Inc. v. Hale*, 463 U.S. 491, 498 (1983).

Even a cursory examination of Specification 13.1, and the underlying Project Agreement which it enforces, demonstrates beyond debate that the action of the MWRA in negotiating, executing and implementing the project agreement impinges on important Section 7 rights of employees. The NLRA's fundamental precept is based on the premise that:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own

> choosing . . . and shall also have the right to refrain from any or all such activities. . . .

29 U.S.C. § 157.

Article III of the Project Agreement recognizes the signatory unions as the exclusive representative of all construction employees within the scope of the agreement, and compels covered employees, as a condition of employment, to become a member of a signatory union within a specified time period. Thus, the MWRA, through Specification 13.1, has eviscerated the Section 7 rights of project employees to decide for themselves which, if any, labor organization should be their representative. By virtue of this agreement, these same employees have also been denied the fundamental right to decide whether to "join, form or assist [a] labor organization[s]" - and in the process have forfeited their right to participate in the collective bargaining process which has pre-determined their terms and conditions of employment for the next ten years.

It is likewise a well-recognized principle of the National Labor Relations Act that an employer commits an unfair labor practice by dealing with a union that does not have the support of a majority of the workers. See *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737-738 (1961). As the Court noted in that case, "there could be no clearer abridgement of Section 7 of the Act, assuring employees the right to bargain collectively through representatives of their own choosing or to refrain from such activity" than to grant exclusive bargaining status to an agency selected by a minority of the employees, *thereby imposing that agreement on the non-consenting majority. Id.* at 737.

Petitioners do not dispute that these important Section 7 rights have been compromised.[5] However, they assert that the

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[5] Petitioners declined to address pre-emption under *Garmon* in their brief. Nevertheless, Petitioners have attempted to export the "state interest" exception to pre-emption under *Garmon* to a *Machinists* analysis. Since the

actions of the MWRA should be judicially approved because a private sector employer would have been allowed to engage in this conduct. They further assert that this conduct is permissible as "a legitimate response to state procurement constraints or to local economic needs." Pet. brief at 34-35.

As to Petitioners' first argument in this respect, the alleged ability of a private sector employer to engage in similar conduct is irrelevant to a pre-emption analysis.[6] "The NLRA, moreover, has long been understood to protect a range of conduct against state but not private interference." *Gould*, 475 U.S. at 290. With respect to Petitioners' second contention, this Court's decision in *Brown v. Hotel Employees Union Local 54*, *supra*, makes it clear that no balancing of state interests is permissible where the state action in question interferes with conduct which is actually protected under the Act.

Even if a balancing of state interests were appropriate in this case, Petitioners misstate the focus of the balance to be made. In seeking to balance state interests against potential conflicts with national labor policy, the Court has sought invariably to identify the "legitimate and *compelling* state interest" to be protected. *Brown v. Hotel Employees Union Local 54*, 468 U.S. at 509 (emphasis added); *see also San Diego Building Trades Council et al. v. Garmon*, 359 U.S. at 247. Historically, such a compelling state interest has been found only in the case of violence, imminent and immediate threats to the public order, and combatting local crime which had infested a particular industry, none of which is applicable here. *Id.*

While the overall importance of the Boston Harbor cleanup project is not disputable, there is no showing that the project

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Court previously has refused to reach the question of whether this exception applies to a *Machinists* analysis, *Golden State Transit Corporation v. City of Los Angeles*, 475 U.S. 608, 618 note 8, we address Petitioners' arguments as part of a *Garmon* analysis.

[6] As discussed below, a similarly situated private sector property owner *could not* enter into a similar project agreement.

itself is at risk. This Court has never held that state interests in general are sufficient to justify the subordination of specifically protected employee rights embodied in the NLRA. Indeed, in this respect, this case is similar to *Bus Employees v. Missouri*, 374 U.S. 74 (1963), where the Court held that the state's general interest in providing uninterrupted transportation service to its citizens did not justify the state's prohibition of a strike by the unionized employees of a privately owned bus company.

By negotiating, executing and implementing the Project Agreement herein, the MWRA has directly interfered with crucial and critical rights of employees which the National Labor Relations Act specifically protects. In such situations in the past, this Court has not hesitated to find that the state's action was pre-empted by the NLRA, and it should do no less in the instant case. *San Diego Building Trades Council et al. v. Garmon*, 359 U.S. 236 (1959).

B. Pre-emption Under *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976).

A *Machinists* analysis begins with the recognition that the questioned state action concerns conduct which is neither protected nor prohibited by the National Labor Relations Act, but which Congress "intended to be unregulated." *Golden State Transit Corporation v. City of Los Angeles*, 475 U.S. 608, 614 (1986). The *Machinists* doctrine recognizes the integral nature of federal regulation under the NLRA, and protects those areas which Congress intentionally left "to be controlled by the free play of economic forces." *Machinists*, 427 U.S. at 140, quoting *NLRB v. Nash Finch Company*, 404 U.S. 138 (1971).

The question in this case is the extent to which a state agency, such as the MWRA, may compel private sector contractors to execute a specific collective bargaining agreement under Section 8(f) and (e) of the National Labor Relations Act as a condition of being awarded work on a public works project. It must be noted that this is not a case where the state agency

determined to do business only with union contractors, although such a decision clearly would be unlawful. Here the state agency has excluded *all* private sector contractors from the Boston Harbor project, both union and nonunion, except for those contractors willing to agree to terms and conditions of employment dictated by the MWRA.

The legislative history of Section 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f), demonstrates that pre-hire agreements were intended to be entirely voluntary. The House report on the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), Pub. L. No. 86-257, 73 Stat. 519, states

> The Conference adopted the provision of the Senate bill permitting pre-hire agreements in the building and construction industry. [Section 705] Nothing in such provision is intended to...authorize the use of force, coercion, strikes or picketing to compel any person to enter into such pre-hire agreements.

Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, Volume I at 946 (official reprinting 1985).

In addition, during the floor debate Congressman Graham Barden, the floor manager for the Conference Report, cited as controlling the following colloquy between Senators Kennedy and Holland concerning the precursor of Section 705 of the LMRDA:

> Mr. Holland. Was it the intention of the committee that section 604(a) shall require employers to enter into prehire agreements where the union has not been the recognized or certified bargaining agent of the employees involved?
>
> Mr. Kennedy. I shall answer the Senator from Florida as follows — and it is my intention by so answering, to establish the legislative history on this question: It

> was not the intention of the committee to require by section 604(a) the making of prehire agreements, but, rather, to permit them; nor was it the intention of the committee to authorize a labor organization to strike, picket, or otherwise coerce an employer to sign a prehire agreement where the majority status of the union had not been established. The purpose of this section is to permit voluntary prehire agreements. This is because of the inability to conduct representational elections in the construction industry.

Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, Volume II at 1715 (official reprinting 1985).

The voluntary nature of agreements under Section 8(f) and (e) of the National Labor Relations Act is critical to their legality. The legislative history of these provisions makes clear that Congress was concerned that employer and employee rights not be subordinated through any force or compulsion. Thus, although Congress intended to allow such agreements, employers were to be free from government or union coercion in determining whether, or under what conditions, to enter into such agreements. Clearly, an employer's decision whether to enter into such an agreement is a matter which Congress "intended to be unregulated." *Golden State Transit Corporation v. City of Los Angeles*, 475 U.S. 608 (1986).

Here, the MWRA has interfered with this unregulated decision by compelling private sector contractors to execute a specific collective bargaining agreement under Section 8(f) and (e) of the National Labor Relations Act as a condition of being awarded work on a public works project. Petitioners suggest that ~~such~~ state compulsion was contemplated by Congress in enacting Sections 8(f) and (e) of the National Labor Relations Act. The legislative history, however, does not support this suggestion. As the Court noted in *Woelke & Romero Framing Inc. v. NLRB, et al.*, 456 U.S. 645, 663-664 (1982), the voluntary aspect of these statutory provisions are guaranteed by other provisions of the National Labor Relations Act. Most of these protections simply are not available when a state agency such as the MWRA is involved. Thus, the integrated regulatory framework envisioned by Congress in legislating Section 8(f) and (e) as part of the National Labor Relations Act, is not applicable when an entity like the MWRA is a party to the activity otherwise regulated by the NLRA. Since the statutory safeguards enacted by Congress to limit abuses of Sections 8(f) and (e) of the NLRA are not applicable to the MWRA, there is no reasonable basis for concluding that Congress intended state agencies, such as the MWRA, to enter into agreements under Sections 8(f) and (e) of the National Labor Relations Act.

Section 8(f) of the National Labor Relations Act is a narrow exception to the general rule protecting employee free choice and employer management rights. It is applicable only to an employer "engaged primarily in the building and construction industry" and to agreements meeting very specific qualifications. Petitioners attempt to make much of the statement of the majority below that "the master labor agreement between the Trades Council and Kaiser is a valid labor contract." 935 F.2d at 356. However, when read in context, it is clear that the majority merely was observing that *absent the involvement of the MWRA* the contract otherwise satisfied the requirements of Section 8(f) and (e) of the Act. Since it is the involvement of the MWRA and the negotiation, execution and implementation of the Master Labor Agreement which is at issue in this case, the legitimacy of the contract absent such involvement truly is "irrelevant to the pre-emption issue at hand." 935 F.2d at 357.

The fact that the project agreement between Trades Council and Kaiser in this case otherwise satisfies the requirements of Section 8(f) and (e) of the National Labor Relations Act, does not conclude the matter in this case. Section 8(f) is specifically

limited to employers "engaged primarily in the building and construction industry" and Section 8(e) is limited to employers "in the construction industry." Here, the Massachusetts Water and Resource Authority neither is an employer under the Act, nor is it "engaged primarily in the building and construction industry."

Although Petitioners urge the Court to ignore the fact that the MWRA is explicitly excluded from the National Labor Relations Act, they make no attempt to argue that the MWRA is "primarily engaged in the building and construction industry." The reason for this omission in their briefs is clear, the MWRA is neither "in the construction industry," nor is it "engaged primarily in the building and construction industry." Accordingly, aside from its non-employer status under the NLRA, the MWRA does not meet the threshold requirements for signing a pre-hire agreement.[7]

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[7] Contrary to the arguments of Petitioners and the United States, the legislative history does not support the conclusion that in passing the Construction Industry Amendments in 1959 Congress anticipated government-mandated project agreements. Although the legislative history does contain references to public works projects built under project agreements, there is no showing that these agreements were mandated by the responsible governmental agency. Historically, such project agreements have been negotiated by the responsible private sector contractors without government interference. Thus, the legislative history shows only that Congress anticipated that private contractors on public works projects would be permitted, *not required*, to enter into agreements under Section 8(f) and (e) of the NLRA.

Also, it should be noted that none of the factors considered by Congress in passing the Construction Industry Amendments in 1959 are applicable to the MWRA. Although Petitioners make the contrary argument, even a cursory examination demonstrates otherwise. The two dominant reasons for enacting Section 8(f) of the National Labor Relations Act were (1) to provide predictable labor costs to allow construction contractors to formulate accurate bids, and (2) to provide construction contractors ready access to an available pool of skilled workers.

III. EVEN ASSUMING THE "MARKET PARTICIPANT" DOCTRINE HAS SOME APPLICATION UNDER THE NLRA, PETITIONERS' "MARKET PARTICIPANT" ANALYSIS IS FATALLY FLAWED.

A. The MWRA Is Not A "Market Participant" As That Term Is Commonly Defined.

Even assuming *arguendo* that some aspect of the "market participant" doctrine survived *Gould*, Petitioners' analysis is fatally flawed because the MWRA cannot be considered a "market participant" under any reasonable definition or interpretation of that concept. Any analysis of the "market participant" doctrine must begin with an examination of the relevant market in which the state seeks to participate. In the instant case, the market in question is the market for construction services and the MWRA as a "participant" in this market wishes to control the labor relations of private sector contractors. Unquestionably, this market is heavily regulated by the National Labor Relations Act.

Here, it is undisputed that the MWRA does not intend to employ *any* construction employees. Thus, it cannot fairly be said that the MWRA has any need for "predictable labor costs." The MWRA's only legitimate concern is with predictable *construction* costs, which can be accomplished through the state's competitive bidding procedure. Similarly, the MWRA has no need for a ready supply of labor. Its only legitimate concern is that its contractors are able to staff the project. This can be done in a number of ways without compromising important rights under the National Labor Relations Act. For example, the MWRA could require any successful bidder to demonstrate by objective means the ability to provide sufficient manpower. In the private sector, both union and non-union employers can be expected and required to make such a showing.

Finally, although Congress also was concerned with the relatively short duration of construction projects making traditional representation elections impractical, this factor has no application to the Boston Harbor project, which is expected to last over ten years. In any event, individual contractors on the project remain free to negotiate 8(f) agreements if they deem it to be in their interest.

As is clearly demonstrated by Petitioners' brief, efforts to control third-party labor relations through the negotiation, execution and implementation of project labor agreements, such as that involved herein, implicates numerous provisions of the National Labor Relations Act. Thus, the NLRA controls who may enter into such agreements, regulates the provisions that such agreements may contain, controls the rights of employees to challenge such agreements, and limits the actions which may, or may not, be taken by a union seeking to enter into such agreements.

Petitioners concede, as they must, that the MWRA is not subject to the National Labor Relations Act. As an agency of the Commonwealth of Massachusetts, it is explicitly excluded from the definition of employer in Section 2(2) of the NLRA. Thus, although the "market" in which the MWRA seeks to be a "participant" is heavily regulated by the NLRA, the MWRA itself is not subject to regulation by that statute. This lack of corresponding regulation on both the participant and the market itself destroys the parity which underpins the basic "market participant" assumption, i.e. all parties subject to the same regulation.

The importance of the integrated and all encompassing scheme of regulation under the NLRA is clearly demonstrated by the Court's decision in *Woelke & Romero Framing Inc. v. NLRB, et al.*, 456 U.S. 645 (1982). In concluding that Congress anticipated the "top down" organizing effect on the employer's involved in that case, the Court specifically noted:

> "The "top down" organizing effect of subcontracting clauses sought or obtained in the context of a collective bargaining relationship is limited in a number of ways by other provisions of the National Labor Relations Act."

456 U.S. at 663-664.

The Court specifically contrasted the situation in *Woelke & Romero* with that in *Connell Construction Company*[8] where "many of these protections would not have been available to limit the 'top down' organizing effect of the clauses at issue." 456 U.S. at 664 note 16.

Similarly, in the instant case, where the provisions of the National Labor Relations Act are inapplicable to the MWRA, there is no limitation on the "top down organizing effect" that the subcontracting provisions at issue in this case could accomplish. This absence of regulatory oversight on one of the parties in the "market participant" equation forcefully militates against a finding that Petitioners are privileged to enter into the project agreement herein and in the process escape NLRA pre-emption which would otherwise apply.

Moreover, it should be noted that the MWRA is not driven by the same market forces as private sector participants. Specifically, government officials, unlike their private sector counterparts, are uniquely subject to political pressure from Organized Labor and other special interest groups. Because their tenure in office is subject to the shifting views of the electorate, government officials are particularly sensitized to political pressures from such special voter groups. Thus, the economic viability of a particular business judgment may well prove to be of secondary importance to a government official's instinct for self-preservation. By contrast, in the private sector, special interest groups and members of the public at large typically do not have the power to directly influence the job security of corporate decision makers. Rather, private sector decisions as to whether to negotiate, execute and implement a project agreement are more likely to be based upon economic factors and other legitimate business considerations than upon sheer political pressure.

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[8] *Connell Construction Co. v. Plumbers & Steamfitters Union Local No. 100*, 421 U.S. 616 (1975).

Finally, in contrast to private sector employers, the MWRA is spending taxpayer-generated funds. For this reason alone, it should be held to a different standard than its private sector counterparts. Where a state agency, such as the MWRA, decides to exclude certain contractors/employers and employees from public works projects based solely upon legally protected labor relations choices of the contractors' employees, it not only interferes with the regulatory scheme of the NLRA, as discussed above, but it also unreasonably and unfairly precludes taxpayers from participating in a project they are required to fund. Why should employees who exercise their right to remain union-free be excluded by the state from gainful employment on those very projects which they helped to fund, solely because of their exercise of federally-protected rights?

In summary, when it comes to dictating the labor relations decisions of third-party contractors, the MWRA simply is *not* a "market participant" as that term is generally defined. It is neither subject to the same legal regulations as private sector participants, nor is it subject to the same market forces. It also has the power to exclude otherwise qualified taxpayers from participation in state-funded projects solely because of their exercise of federally protected rights. Accordingly, the so-called "market participant" doctrine is totally inapplicable to the instant situation and cannot serve as a defense for avoiding the NLRA and its pre-emption principles.

B. Petitioners' "Market Participant" Argument Is Based Upon An Unsupported Premise.

The second flaw in Petitioners' "market participant" argument is its reliance upon an underlying premise which is not supported by judicial precedent. In order to endorse the "market participant" argument, this Court must first conclude that a private sector property owner, which does not directly employ any construction employees, is nonetheless permitted to enter into agreements protected under Section 8(f) and (e) of Act. Not

only is such an underlying supposition unwarranted, it is directly contrary to the decision of the NLRB General Counsel in *Plumbers Union, Local 246 (Marlin Mechanical, Inc.)*, NLRB, Case No. 32-CE-52 (NLRB-GC January 31, 1989) (original complaint reprinted as Appendix A hereto).

The fundamental premise underpinning Petitioners' entire argument is that a private property owner, which does not itself employ construction employees, is free to enter into collective bargaining agreements under Section 8(f) and (e) of the National Labor Relations Act. However, Petitioners fail to cite any judicial precedent to support such a conclusion. The sole "authority" cited by Petitioners is a 1986 decision of the General Counsel of the NLRB dismissing a challenge to a prehire agreement covering the construction of the Saturn plant in Tennessee. *Morrison-Knudsen*, 13 Advice Mem. Rep. Par.23,061 (NLRB-GC 1986) (reprinted as Appendix F of the Appendix to the *certiorari* petition in No. 91-261 ("BCTC Pet. App."), at 97a-102a).[9]

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[9] An administrative decision of the NLRB General Counsel, unsupported by either NLRB or judicial approval, hardly constitutes compelling or persuasive authority upon which this Court should premise its decision in the instant case. The NLRB General Counsel is a "prosecutorial" official whose administrative decisions not to issue complaints are unreviewable by any court. *NLRB v. United Food & Commercial Workers Union, Local 23, AFL-CIO*, 484 U.S. 112 (1987). As the NLRB held long ago,

> [The General Counsel's] primary function is to investigate charges and prosecute cases before the Board. *The task of making binding interpretations of the meaning of the Act is a judicial function*, vested in the Board Members with ultimate power of review in the courts.

Betts Cadillac Olds, Inc., 96 NLRB 268, 272 (1951), emphasis added; see also *McBride's of Naylor Road*, 229 NLRB 795, 797 n.2 (1977), and *Exxon Company, U.S.A.*, 253 NLRB 213 (1980).

Indeed, any precedential value of an administrative refusal to issue a complaint is refuted by this Court's decision in *Connell Construction Com-*

The failure of the General Counsel to challenge the private sector project agreement in *Morrison-Knudsen, supra*, does not establish that the Saturn agreement was lawful. Furthermore, it should be noted that Morrison-Knudsen was not the owner of the construction site, and it actually employed construction employees at the Saturn site. BCTC Pet. App at 97a.-98a. Moreover, the property owner *was not a party to the project agreement*. BCTC Pet. App at 101a. Accordingly, General Counsel's failure to challenge the Saturn agreement certainly does not serve as a judicial precedent supporting Petitioners' underlying premise that a private property owner, which does not itself employ any construction employees, may enter into collective bargaining agreements under Section 8(f) and (e) of the National Labor Relations Act.

Petitioners' underlying premise was specifically considered by the General Counsel in *Plumbers Union, Local 246 (Marlin Mechanical, Inc.)*, NLRB Case No. 32-CE-52 (NLRB-GC January 31, 1989).[10] Contrary to Petitioners' argument, the

pany, Inc. v. Plumbers and Steamfitters Local Union 100, et al., 421 U.S. 616, 89 LRRM 2401 (1975). In *Connell*, the Court ruled that Section 8(e) does not protect agreements sought outside a collective bargaining relationship notwithstanding the fact that the General Counsel previously had refused to challenge a similar agreement. See, *Connell Construction Company, Inc. v. Plumbers and Steamfitters Local Union 100, et al.*, 483 F.2d 1154 (5th Cir. 1973).

[10] *Marlin Mechanical* is referenced at note 12 in *Building & Trades Council*, NLRB Case No. 1-CE-71 (NLRB-GC June 25, 1990) (NLRB Division of Advice Memorandum on the Project Agreement) (reprinted as Appendix D at BCTC Pet. App. 83a-88a). Although Petitioner cites this Advice Memorandum in a related argument, noticeably absent from Petitioner's argument is any discussion of the comments of the NLRB General Counsel in Case No. 1-CE-71 concerning the significance of a private sector employer's failure to employ any construction employees. Specifically, the decision states "[t]he General Counsel has authorized 8(e) proceedings where the employer did not hire and did not intend to hire any construction employees." *Id.* at 87, note 12.

General Counsel rejected the identical argument and issued a complaint alleging that a construction industry employer who did not hire and did not intend to hire any construction employees *was prohibited* from entering into a collective bargaining agreement under Section 8(f) and (e) of the NLRA.[11]

Thus, contrary to Petitioners' argument, it would appear that the NLRB General Counsel has previously determined that a private sector employer which does not employ any construction employees may not avail itself of the protection afforded under under Section 8(f) and (e) of the NLRA.[12]

C. Since The NLRA Is Inapplicable To The States, There Is No Basis For Limiting The "Market Participant" Analysis To Construction Industry Project Agreements As Petitioners Contend.

Petitioners have indicated that their analysis would permit only such contracts as are allowed in the private sector. However, Petitioners ignore the practical effect of such a rule. If the MWRA is permitted to do what the Act condones for private employers, and is not permitted to engage in conduct that the Act prohibits to private employers, then the MWRA would be

[11] This portion of the complaint subsequently was withdrawn by the General Counsel as a result of additional evidence that the Employer did employ an employee who performed work covered by the agreement and who was in fact covered by the agreement. See Appendix B hereto. Thus, neither the Board nor the courts were given the opportunity to consider the NLRB General Counsel's analysis of Section 8(f) and (e) of the NLRA. Nevertheless, *Marlin Mechanical* clearly demonstrates that the NRLB General Counsel has specifically rejected Petitioner's underlying premise that a private sector employer similar to the MWRA would be permitted to enter into the agreement at issue in this case.

[12] Although the General Counsel dismissed the charge in Case No. 1-CE-71, it must be noted that his decision specifically stated "[t]here is no contention that the [Kaiser] acted as an agent of MWRA rather than as a principal when it signed the Agreement." *Building & Trades Council, supra* note 3. As we now know, it is undisputed that Kaiser acted as an agent of MWRA when it negotiated and signed the instant Project Agreement.

de facto subject to the National Labor Relations Act. This would be contrary to the explicit exclusion of "any State or political subdivision thereof" from the definition of employer in Section 2(2) of NLRA. Petitioners make no attempt to address the inherent contradictions posed by their analysis.

Moreover, the detailed analysis of the motivations and actions of the MWRA set forth in Petitioners' brief demonstrates the critical flaw in their analysis. In excluding the states from coverage under the NLRA, it was the intention of Congress to preclude such detailed scrutiny of state actions and motives. If the analysis advocated by Petitioners were to be adopted, every pre-emption case involving state action would trigger a comparison of the motivations of the state with similar motivations of private sector employers. The ultimate litmus test of pre-emption in such cases would be measured by the rights and obligations of private sector employers. Clearly, this was not the result which Congress intended when it excluded the states from coverage under the NLRA.

The purposeful design of the NLRA was to exclude state agencies such as the MWRA and to further insure that their actions do not interfere with the Act's "integrated scheme of regulation." This is true whether that interference occurs through the exercise of state regulatory power or state spending power. If Petitioners wish to subject state action to scrutiny under the National Labor Relations Act, or to allow state action to interfere with or contradict its regulatory framework, their petition should be directed to Congress, not to this Court.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be sustained.

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
REGION 32

Case 32-CE-52

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE-FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, LOCAL UNION No. 246

and

MARLIN MECHANICAL, INC.

and

FRU-CON CONSTRUCTION
Party to the Contract

and

BUD BAILEY CONSTRUCTION
Party to the Contracts

COMPLAINT AND NOTICE OF HEARING

It having been charged by Marlin Mechanical Inc., herein called Marlin, that United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local Union No. 246, herein called Respondent, has engaged in, and is engaging in, certain unfair labor practices effecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et. seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1.

The charge was filed by Marlin on October 26, 1987, and a copy thereof was served on Respondent by certified mail on the same date.

2.

(a) At all times material herein, Marlin has been a contractor with an office and place of business located in Visalia, California, where it is engaged in the business of installing heating, cooling and sprinkler systems.

(b) At all times material herein, Bud Bailey Construction (herein called Bailey) has been a contractor with an office and place of business located in Salt Lake City, Utah, where it is engaged in business as a construction contractor.

(c) At all times material herein, FRU-CON Construction (herein called FRU-CON), has been a contractor with a principal office and place of business located in Ballwin, Missouri, where it is engaged in business as a general construction contractor.

(d) During the past twelve months, FRU-CON, in the course and conduct of its business operations, performed services valued in excess of $50,000 directly for customers located outside the State of Missouri.

(d) During the past twelve months, Bailey, in the course and conduct of its business operations, performed services valued in excess of $50,000 directly for customers located outside the State of Utah.

3.

(a) FRU-CON and Bailey are each now, and have been at all times material herein, employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

(b) Marlin is now, and has been at all times material herein, a person within the meaning of Section 2(1) of the Act.

4.

(a) Respondent is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

(b) At all times material herein, Bob Ward occupied the position of Respondent's Business Agent and has been, and is now, an agent of Respondent within the meaning of Section 2(13) of the Act.

5.

(a) On or about April 6, 1987, FRU-CON entered into an agreement with Respondent and other building trade unions (herein called the Project Agreement), to be effective April 14, 1987, relating to the contracting and subcontracting of on-site construction work at a new snack plant at Visalia, California (herein called the Project).

(b) Article II, paragraph D of the Project Agreement (herein called the Union Signatory Clause) states:

> D. In theevent the Employer subcontracts out any work covered by this Agreement such subcontractor shall become signatory to this Agreement for such work. It being understood that the subcontractors presently employed by the Employer are not subject to this Agreement but may, by executing this Agreement, become party to and beneficiary of this Agreement. Attached hereto and marked Exhibit A and incorporated by reference herein is the List of Subcontractors excluded from this Agreement.
>
> It is understood that there a may be instances when suitable, competitive union subcontractors may not be available for certain subcontracts. In such instances,

the Employer will notify the Union 10 days prior to the bid, and the Union will endeavor to locate suitable, competitive union subcontractors to bid for the work. If the Employer and the Union are unable to locate such suitable subcontractors, it is understood and agreed that the Employer will be relieved of the requirements of this paragraph D for such subcontracts.

6.

Marlin did not become aware of the conduct alleged in paragraphs 5(a) and (b) above until a date after April 26, 1987.

7.

In or about June, 1987, FRU-CON solicited subcontracting bids for an interior phase of the Project (herein called the Interior Work).

8.

(a) In or about June, 1987, Bailey submitted a bid (herein called the Bid) for the Interior Work, which Bid included a list of Bailey's proposed subcontractors, including Marlin.

(b) Sometime in or about June, 1987, Bailey was awarded the Interior Work by FRU-CON.

9.

In or about the last week of June, 1987, Respondent, by its Business Agent Bob Ward, informed Bailey that Marlin was not signatory to any collective bargaining agreement with Respondent.

10.

On or about July 17, 1987, Bailey, by its Project Manager Mike Evans, advised Respondent by letter of Bailey's intent to award certain mechanical work encompassed in the Bid to Marlin.

11.

In or about July, 1987, Respondent, by its Business Agent Bob Ward, notified FRU-CON that Marlin was not signatory to any collective bargaining agreement with Respondent, and would have difficulty becoming signatory to any collective bargaining agreement because of prior labor disputes with Respondent.

12.

On or about July 22, 1987, Bailey, by its Project Manager Mike Evans, advised Marlin that Bailey would not sign a subcontract for work on the Project with Marlin until Marlin obtained the approval of Respondent.

13.

On or about July 27, 1987, Respondent, by its Business Agent Bob Ward, advised Marlin that Respondent would continue to oppose Marlin becoming signatory to any subcontract involving work on the Project unless Marlin became signatory to an area-wide, full-term collective bargaining agreement with Respondent, and not simply the Project Agreement.

14.

On or about August 10, 1987, Bailey, by its Project Manager Mike Evans, informed Marlin that Bailey would not enter into a subcontract with Marlin for work on the Project.

15.

At no time material herein was a collective bargaining relationship in existence or envisioned between Respondent or the other labor organizations party to the Project Agreement, and FRU-CON or Bailey, in that neither FRU-CON nor Bailey then employed or intended to employ, or ever employed, any employees covered by the Project Agreement.

16.

The acts and conduct of Respondent described in paragraphs 9, 11, and 13 above constitute a reaffirmation, or a "re-entering into," of the provisions of Union Signatory Clause.

17.

(a) The acts and conduct of Respondent and Bailey as described above in paragraphs 12, 13, and 14 constitute an "entering into" of an agreement relating to the subcontracting of work to be done at a construction site.

(b) Sometime in or about June, 1987, Respondent and Bailey entered into or adopted the terms of the Project Agreement.

18.

By the acts and conduct described above in paragraphs 5, 9, 11, 12, 13, 16 and 17, Respondent has entered into, maintained, and/or given effect to agreements whereby FRU-CON and/or Bailey have ceased and refrained, and have agreed to cease and refrain, from doing business with other employers or persons, including Marlin.

19.

The acts of Respondent described above in paragraphs 5, 9, 11, 12, 13, 16, 17 and 18, and each of said acts, constitute unfair labor practices affecting commerce within the meaning of Section 8(e) and Section 2(6) and (7) of the Act.

WHEREFORE, as part of the remedy for the unfair labor practices alleged above, the General Counsel seeks an Order requiring that Respondent, *inter alia*, not enter into, maintain, give effect to, or enforce the Union Signatory Clause or other agreement alleged here, to the extent the aforesaid agreements violate Sectin 8(e) of the National Labor Relations Act.

PLEASE TAKE NOTICE that on the 21st day of March, 1989, at 9:00 a.m. Pacific Standard Time, in Fresno, California, at a place to be designated hereafter, and continuing on consecutive days thereafter until completed, a hearing will be conducted before a duly designated Administrative Law Judge of the Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Statement of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

YOU ARE FURTHER NOTIFIED that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, Respondent shall file with the undersigned, acting in this matter as agent of the Board, an original and four (4) copies of an Answer to said Complaint within fourteen (14) days from today and that unless it does so, all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its Answer, Respondent shall serve a copy thereof on each of the other parties.

DATED AT Oakland, California this 31st day of January, 1989.

/s/James S. Scott
JAMES S. SCOTT, Regional Director
National Labor Relations Board
Region 32
2201 Broadway, 2nd Floor
P.O. Box 12983
Oakland, California 94604

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
REGION 32

Case 32-CE-52

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE-FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, LOCAL UNION NO. 246

and

MARLIN MECHANICAL, INC.

and

FRU-CON CONSTRUCTION
Party to the Contract

and

BUD BAILEY CONSTRUCTION
Party to the Contracts

ORDER WITHDRAWING PORTIONS OF COMPLAINT AND DISMISSING PORTION OF UNFAIR LABOR PRACTICE CHARGE

On January 31, 1989 Complaint issued in the above case, alleging, inter alia, that United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local Union No. 246, herein called Respondent, and Bud Bailey Construction, herein called Bailey, entered into an agreement relating to the subcontracting of work to be done at FRU-CON Construction's snack plant construction project at Visalia, California, and that said conduct on Respondent's part violated Section 8(e) of the National Labor Relations Act, as amended, herein called the Act.

Subsequent to the issuance of the Complaint, as a result of additional evidence and information obtained during the course of pre-trial preparation, it has been determined that the alleged Section 8(e) agreement between Respondent and Bailey was entered into in the context of the type of collective bargaining relationship envisioned under *Connel Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (197) and *Woelke & Romero Framing Co. v. N.L.R.B.*, 456 U.S. 645 (1982), in that Bailey, during the life of that agreement, did employ an employee who performed work covered by that agreement and who was in fact covered under that agreement. See also *Morrison-Knudsen Co.*, Cases 26-CE-8 et al., Advice Memorandum dated March 27, 1986. Accordingly, as Respondent's conduct concerning its subcontracting agreement with Bailey can no longer be viewed as unlawful.

IT IS HEREBY ORDERED, pursuant to the provisions of Section 102.18 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, that the references to Bailey in paragraph 15; paragraph 17; and the references to paragraphs 9, 12, and 17 in paragraphs 18 and 19 in the Complaint issued in Case 32-CE-52 be, and they hereby are, withdrawn.

IT IS HEREBY FURTHER ORDERED that to the extent that the charge filed in Case 32-CE-52 alleges that Respondent has violated and is violating Section 8(e) of the Act by reason of it having "entered into" an agreement with Bailey regarding the subcontracting of work to be done at the FRU-CON Construction Visalia, California snack plant project, all such allegations be, and they hereby are dismissed. The remaining allegations in Case 32-CE-52, as well as the remaining allegations in the Complaint issued therein, are not being dismissed,

but remain the subject of further proceedings.[1]

DATED AT Oakland, California this 16th day of October, 1990.

/s/James S. Scott
JAMES S. SCOTT, Regional Director
National Labor Relations Board
Region 32
2201 Broadway, 2nd Floor
P.O. Box 12983
Oakland, California 94604

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[1] Pursuant to the National Labor Relations Board's Rules and Regulations, Series 8, as amended, a review of this action may be obtained by filing an appeal with the General Counsel, addressed to the Office of Appeals, National Labor Relations Board, Washington, D.C. 20570, with a copy to the Regional Director. This appeal must contain a complete statement setting for the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D.C. by close of business on October 30, 1990. Upon good cause shown, however, the General Counsel may grant special permission for a longer period of time within which to file. Any request for an extension of time must be submitted to the Office of Appeals in Washington, D.C., and a copy of any such request should be submitted to the Regional Director.

If you file an appeal, please complete the notice forms I have enclosed with this Order, and send one copy of the form to each of the other parties involved in this case. Their names and addresses are listed on the attached Affidavit of Service. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel, and a copy of the appeal with the Regional Director within the time stated above.